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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/037,821	11/09/2001	Simpey Kuramoto	4646.000026	6562
23387	7590	02/20/2004	EXAMINER	
Stephen B. Salai, Esq. Harter, Secrest & Emery LLP 1600 Bausch & Lomb Place Rochester, NY 14604-2711			PRATT, HELEN F	
		ART UNIT		PAPER NUMBER
				1761

DATE MAILED: 02/20/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	10/037,821	KURAMOTO ET AL.
	Examiner	Art Unit
	Helen F. Pratt	1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

#### A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1)  Responsive to communication(s) filed on 11-12-04.
- 2a)  This action is **FINAL**.      2b)  This action is non-final.
- 3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4)  Claim(s) 1-35 is/are pending in the application.
  - 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5)  Claim(s) \_\_\_\_\_ is/are allowed.
- 6)  Claim(s) 1-35 is/are rejected.
- 7)  Claim(s) \_\_\_\_\_ is/are objected to.
- 8)  Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9)  The specification is objected to by the Examiner.
- 10)  The drawing(s) filed on \_\_\_\_\_ is/are: a)  accepted or b)  objected to by the Examiner.
 

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11)  The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12)  Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a)  All    b)  Some \* c)  None of:
    1.  Certified copies of the priority documents have been received.
    2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.	5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)
	6) <input type="checkbox"/> Other: _____

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 1, 4- 9, 15 are rejected under 35 U.S.C. 102(a) as being anticipated by Cheerios (Recipes from Heart Healthy).

The claims are rejected for the reasons of record cited in the last office action.

Claims 1-17, 19 are rejected under 35 U.S.C. 102(b) as being anticipated by Deleon et al. (WO 00/47063).

The claims are rejected for the reasons of record cited in the last office action.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 18-35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cheerios or Dulebohn et al. or (WO 47063) in view of Cherrios.

The claims are rejected for the reasons of record cited in the last office action.

## ARGUMENTS

Applicant's arguments filed 11-12-04 have been fully considered but they are not persuasive. Applicants argue that the definition that they supply of "homogenized" should be applied. However, applicants' specification is not limited to such a narrow definition. In addition, applicants' definition is to the treatment of milk, whereas the instant claims are to homogenizing cereal and milk and possibly stabilizers. Further, Webster's dictionary does not require such a narrow definition which is "a blend (diverse elements) into a uniform mixture b: to make homogenous 2 a: to reduce to small particles of uniform size and distribute evenly usually in liquid. B: to reduce the particles of so that they are uniformly small and evenly distributed: specific: to break up the fat globules of (milk) into very fine particles esp. by forcing through minute openings:", page 578 (Websters). Therefore, it is seen that absent a definition in the specification, that a broader definition can be applied to the claims of homogenization.

Applicants argue that the reference to Dulebohn does not disclose homogenization, that stirring and liquefying in a blender is not homogenization. As above, the dictionary definition of homogenization is broader than the one supplied in applicants' amendment and no basis is seen in the specification to limit the term "homogenization" to that of the one supplied.

Applicants argue as to claims 18 and 19, 20-29, 30-32 that a "homogenized" blend has not been disclosed. However, it is seen that the claims are not limited to the narrow definition supplied by applicants as stated above.

Applicants argue also as to claims 30-32 that SUCRELESS of Dulebohn is used to stabilize milk proteins. However, the reference also uses polysaccharides such

as xanthan gum or carrageenan gum, etc. with a cereal grain (page 4, lines 5-13, 19-26). Claims 30-32 are not limited to any particular stabilizers, and do not exclude SUCRELESSE nor the use of juice products.

Applicants argue as to the particle sizes of claims 33-35 which have now been amended to require the use of 60 micron particle sizes. However, nothing critical is seen in the use of a particle size of 60 microns. Applicants' specification discloses that the size can be less than 100 microns, preferably 10 to 60 microns and the size can be determined by the mouth feel of the product (page 8, 2<sup>nd</sup> paragraph).

Applicants argue that there is no support that the SUCRELESSE for binding milk proteins to reduce precipitation is a food stabilizer as recited in the claims. This is not seen, because it is important to reduce the precipitation of milk proteins. Otherwise, the product would not have been smooth. Therefore, SUCRELESSE does provide a stabilizing function in keeping the milk protein in solution. In addition, other polysaccharides can be used as discussed above.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 703-308-1978. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 2-11-04

H. Pratt  
HELEN PRATT  
PRIMARY EXAMINER